JOHN C. CALHOUN AND THE LABOR QUESTION.

THE system of slavery as it existed in this country before the Civil War and the present labor movement present one common feature, — a strong opposition to what may be called "free labor;" that is, labor directly competing with, but outside the control of, the system. In most cases this opposition has been of a local character, involving state or municipal laws alone, but sometimes, when the effort has been made to exclude from a State free laborers from other States, Federal questions have arisen, rights derived from the national Constitution have been measured against state authority, the relation of the States to each other and to the national government have been considered, and great political questions like Nullification, State's Rights, and Secession have been argued and decided on legal grounds long before their appearance in politics.

Had slavery been, as the South claimed, a purely domestic institution in the States where it existed, it could not have entered national politics. The system depended, however, upon exclusion of free competition; that is, as has been said, the necessity which required that it should dominate wherever it existed made it particularistic and exclusive. This is the origin of Calhoun's theories of the Constitution, and of those influences which forced the system of arbitrary control from the position of a domestic institution into the broad field of national politics. By the Constitution, Congress is given a national power of commercial regulation. Let such a power once be established and no State could exclude its operation. By the Constitution, citizens of each State have the rights and privileges of citizens of the several States, and wherever this was recognized any person could move from one State to another and freely compete there for labor. But the exercise of this right in Southern States plainly would be nothing less than the substitution of competition for a system of arbitrary control.

The question, therefore, which before the Civil War occupied so great a place in national politics, was a labor question in which those who supported the dominant system were in recognized opposition to the Constitution.

It is the same situation which has again arisen. We have once more the dominance of a labor system, the effort to exclude free competition, the resulting expansion from the position of a domestic institution into national politics, and then the necessary conflict with a free Constitution. There is even a flavor of State's Rights and Secession in Governor Tanner's threat, something more than a year ago, that "I will not tolerate this wholesale importation of foreigners into Illinois, and if I hear that a mob is to be brought into this State," . . . "I care not on what railroad it comes, or for whom, I will meet it at the state line and shoot it to pieces with Gatling guns."[1] Still more recently Arkansas has endeavored to prevent the entrance of free laborers from other States,[2] and other similar instances are not uncommon.[3] Both in Illinois and Arkansas the attempt led to great violence, and placed considerable territories in a condition comparable only to that of civil war.[4]

It may be worth while, therefore, in view of the strength of the recent movement, to review the history of a similar movement attempted in the interest of slavery, to show how close a connection existed between its theories and direct assault upon national existence, and to outline the progress of this assault from resistance to the courts, until, joining with other causes operating in the same general interest, the result was open rebellion and resistance to the Federal army.

By the laws of many States before the Civil War, immigration of free persons of color was forbidden.[5] In pursuance of this policy, South Carolina in 1822 passed a law of which the third section enacted, "that if any vessel shall come into any port or harbor of this State from any other State or foreign port, having on board any free negroes, or persons of color as cooks, stewards, or mariners, or in any other employment on board of said vessel, such free negroes or persons of color shall be liable to be seized and confined in gaol, until such vessel shall clear out and depart from this State; and that, when such vessel is ready to sail, the captain of said vessel shall be bound to carry away the said free negro, or free person of color."

In many ways, the statute bears a striking resemblance to the

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[1] Speech at Madison, Ill., Oct. 27, 1898.

[2] State of Arkansas *v.* Kansas & Texas Coal Co., 96 Fed. 353.

[3] The Commerce Clause of the Federal Constitution, by E. P. Prentice and J. G. Egan, 192.

[4] United States *v.* Sweeney, 95 Fed. Rep. 434.

[5] The Commerce Clause of the Federal Constitution, 212 *et seq.*

law of Louisiana which the United States Circuit Court declared unconstitutional in 1895,[1] and which provided "that no sailor, or portion of the crew of any foreign sea-going vessel, shall engage in working on the wharves or levees of the city of New Orleans beyond the end of the vessel's tackle."

In 1823 the validity of the South Carolina law was attacked before Mr. Justice Johnson of the United States Supreme Court sitting on circuit in Charleston.[2] By the provisions of the Federal Constitution, citizens of each State are entitled to the privileges and immunities of citizens of the several States, and among the rights thus secured is "the right of a citizen of a State to pass through or reside in any other State for the purpose of trade, agriculture, professional pursuits, or otherwise."[3] This was the very right which the legislature of South Carolina denied. What, then, was to be the effect of these discordant laws?

On behalf of free labor it was claimed that, within the scope of its operation, the Federal Constitution is supreme. For the slave-owners it was urged that, if a law passed by the State in the exercise of its acknowledged sovereignty comes into conflict with the Federal Constitution, they affect the subject and each other like equal opposing powers.

I have not seen the fact noticed elsewhere, but it is of historical importance that thus in 1823, nine years before the famous ordinance of South Carolina, the doctrine, afterward known as Nullification, was argued before a Federal court, and submitted to it for decision.

The position in which Mr. Justice Johnson was placed must have been exceedingly difficult. There was probably more or less disorder at the time, for the question was one which commonly awoke excitement; he was alone on the bench, and the whole weight of public sentiment in the commuity where he sat supported the organized system of the South. Like other judges of the Federal Circuit and District courts, and like most of the Federal justices, Mr. Justice Johnson had been a resident of the circuit to which he was assigned. He knew the tendencies of public opinion in the circuit, and was so situated as to feel their force. There must have been a strong temptation to yield to all these influences. Congress itself, when petitioned by Northern sailors for relief

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[1] Cuban S. S. Co. *v.* Fitzpatrick, 66 Fed. Rep. 63.

[2] Elkison *v.* Deliesseline, 2 Wheel. Cr. Cas. 56.

[3] Corfield *v.* Coryell, 4 Wash. C. C. Rep. 371; Von Holst, Const. Hist. U. S., 1846–1850, p. 140, note 1.

against this law, felt the pressure, for it took no action, and, as Prof. Von Holst remarks, "either considered the matter too unimportant to bother itself about, or else considered it prudent to let such a ticklish question alone."[1] Not so with Mr. Justice Johnson. The questions presented were simple. The first concerned the right of a free citizen of Massachusetts to enter and labor in the State of South Carolina. Does such a right exist? "The right to one's self," said Thiers, "to one's own faculties, physical and intellectual, one's own brain, eyes, hands, feet, in a word to his soul and body, is an incontestable right, one of whose enjoyment and exercise by its owner no one can complain, and which no one can take away. More than this, the obligation to labor is a duty, a thing ordained of God, and if submitted to faithfully secures a blessing to the human family."[2] This "incontestable right" is one of the privileges and immunities secured by the Federal Constitution.[3] The second question concerned the supremacy of the United States government. Does the Constitution create a nation, or does it leave a number of sovereign States each free to nullify at pleasure the action of the Federal authorities? If freed from political influences, no simpler questions could have been presented, and in the Federal court no room was found for politics. It was under these circumstances that there was rendered the first of that long series of decisions by which the Federal courts have consistently maintained the right of every citizen to follow any lawful occupation at any place in the country. More than this, Nullification was for the first time judicially declared unconstitutional. The United States Constitution, "the most wonderful instrument ever drawn by the hand of man," said Mr. Justice Johnson in language suggestive of the famous phrase afterward used by Mr. Gladstone, created a paramount government which a State cannot throw off at its own will and pleasure.[4]

The following year the same question, arising upon somewhat different facts, but involving the same principle, came before the Supreme Court of the United States in the great case of Gibbons *v.* Ogden.[5] In the opinion of the court rendered in that case, the supremacy of the Federal authority and the exclusive character of

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[1] Const. Hist. of U. S., 1846–1850, p. 129.

[2] Thiers, De la Propriété, 36, 47.

[3] Corfield *v.* Coryell, 4 Wash. C. C. Rep. 371; Ward *v.* Maryland, 12 Wall. 418, 430; Joseph *v.* Randolph, 71 Ala. 499; United States *v.* Sweeney, 95 Fed. Rep. 434, 450.

[4] Elkison *v.* Deliesseline, 2 Wheel. Cr. Cas. 56.

[5] 9 Wheat. 1.

the national control of commerce were clearly defined, and the rule then laid down is the established rule of the Federal courts to-day. In reading that momentous decision, apprehending, as we do now, the interests which were at stake, and with which the conclusion was pregnant, one cannot help pausing to wonder what might have been the result had that decision in any way been different from what it was. Had the utterance of the court upon the powers of the States been ambiguous; had expression upon the relation of the States to the Federal government been avoided and the element of nationality involved less explicitly been disclosed and asserted; had the advocates of the doctrine of Nullification, when the question entered the political field eight years later, the authority behind them of the Supreme Court, — where would the influence of that decision have led us now? The question at issue, we may be sure, had not then its present significance. Those who upheld the vast combination controlling Southern labor and excluding free competition had not yet been carried by their interests to seek the dissolution of the national government.

Notwithstanding these judicial decisions, South Carolina continued to enforce the unconstitutional statute, and her example was followed in Louisiana by the passage of a similar act, while at the same time the illegality of the proceedings was tacitly recognized, when, upon the protest of the English government, an exception in the operation of the statute was made in favor of foreign vessels. The freedom thus given to foreigners, however, the Federal government was unable to procure for its own citizens, and the matter, although often agitated,[1] rested until 1844, when the State of Massachusetts sent Samuel Hoar to Charleston and Henry Hubbard to New Orleans, there as its agents to take such legal steps as might be necessary to procure the discharge of citizens of Massachusetts imprisoned under these laws.

The arrival of these representatives in the cities to which they were sent created great excitement. It immediately became apparent that the labor question was not to be treated as other questions, that the law was not to be applied to it as to other subjects, but that its issues were to be determined in the street and by force. In both cases the mission was fruitless and the effort to appeal to the courts was abandoned. The laws directed against free labor solely because it was free remained upon the statute

[1] Report No. 80, House of Representatives, 27th Congress, 3d Session; Validity of South Carolina Police Bill, 1 Op. Atty.-Gen. 659, 2 Ib. 426, and cases cited in "Commerce Clause," p. 37, note 1.

books of Southern States "until swept away by the fire and blood which destroyed the guilty cause itself."

"What, and how potent," said Vice-President Wilson, "was the agency which this persistent injustice, these continued oppressions, exerted on that struggle, Omniscience only knows. How important a factor it became in that combination of causes which hastened on the bloody struggle, no human sagacity can divine. Nor can it be known how much the manly stand of Massachusetts, though then overborne, contributed to the building up of that power which, sixteen years later, grappled with slavery in arms and closed its career of crime."[1]

In 1856, during the Kansas-Nebraska troubles, another aspect of the question arose which in some ways resembles conditions of recent occurrence. Kansas was claimed by the South, and this claim could be made good if free immigration could be excluded. The attempt was made, therefore, to prevent this immigration by force, and it was not long before many avenues of approach were occupied by border ruffians whose business it was to prevent free immigration. It was in this state of affairs that President Pierce called a special session of Congress that an appropriation might be made for the army. The bill introduced for the purpose contained a proviso looking to the use by the President of Federal troops to protect persons and property in the Territory of Kansas and upon the national highways leading thereto, as Federal troops have since then been used to protect national highways, mails, and interstate carriers.

In the Senate, debate upon the proviso was long and bitter. The Southern States, and all who with them supported the Southern system, had passed beyond their attitude of opposition to the Constitution and of disregard for judicial decisions to an attitude of open resistance to the Federal government. It is true that the use of the army as guardians of the peace upon the national highways could be hostile only to those who contemplated a breach of the peace, but opponents of the army did not shrink from the implied confession. Their cause depended so largely upon violence, and by it had won so many victories, that they could not regard the adoption of any effectual method for preserving public peace as an impartial performance of a primary governmental function, but rather considered it direct assistance of their enemies. The ques-

[1] Rise and Fall of the Slave Power in America, vol. 1, p. 585.

tion was fast becoming one of force merely, and the first battle against the Union armies was openly fought in Congress.

The national government, it was argued, had no right to protect interstate highways or interstate carriers. National highways leading to Kansas, it was said, extended through every State in the Union. "There are in Massachusetts," said Senator Cass, "national highways leading to Kansas." A proposition that the Federal power extended over such roads had never before been heard. "What right has the President to go into Missouri, Iowa, Illinois, or Indiana, and say, 'This is a national highway leading to Kansas; here I put my soldiers'? The State of Missouri protects individuals on the highways of Missouri, and you have no more right to go there and interfere with her than the English Parliament has."

The same position was taken by Senator Toucey of Connecticut, who was shortly afterward made Secretary of War. "If," he asked, "the President can protect persons and property in one portion of the country, can he not in another?" And then, as the consciousness asserted itself that his real purpose was not to debate constitutional questions, but was rather, at all events, to defend the interests of a labor system, he put the further question, "Can the President march an army into one of the Southern States, and, being of the opinion with some that slavery does not and cannot exist, interfere there and protect persons and property according to those motives?"

It would be hard to find an incident illustrating more clearly the incompatibility of slavery and free institutions. No single government could protect both. While it was necessary to protect slavery, commercial development of the country must wait; free intercourse between the States was impossible.

It was under the influence of these interests that Calhoun developed his doctrine that the United States Constitution created no nation; that the government which it established was Federal rather than national, "because it is the government of a community of States and not the government of a single State or nation." Its influence may be seen throughout the course of constitutional history before the Civil War, and although it had the distinct disapproval of the Supreme Court it was a doctrine which, by reason of its association with industrial interests controlling politics, no decision could overthrow.

Among the many constitutional changes which the Civil War produced, no other is so great as that effected by the disappear-

ance of this theory. In Crandall *v.* Nevada,[1] a case involving the right of free passage from State to State, may be found the substance of what was accomplished by that great struggle. All the triumph of the armies of the Union breathes in its stately judgment that "the people of these United States constitute one nation." The power which South Carolina asserted before the war was that of excluding citizens of other States. In 1865, Nevada laid a tax upon persons leaving or passing through the State. The difference is of detail. Both statutes asserted state jurisdiction over interstate travel. Such jurisdiction, the court said, is inadmissible, not alone because forbidden by one or two clauses of the Constitution, but because at variance with the spirit of the whole instrument.

Equal rights for all persons within its protection, — this is the accomplishment of the Federal Constitution.

"The most false and dangerous of all political errors," — this is the judgment of John C. Calhoun on the doctrine of equality.[2] In the system which he represented, equality had no place, and the free laborer was the first to suffer from its absence, for his only possession — the right to work — was taken from him.

In this respect the situation which has grown up since the Civil War exhibits similar conditions. Laborers within the system work upon the terms it establishes; those without have no recognized right to work at all, and to them it helps nothing that control is no longer in the hands of the masters. Government of all who want work by some who want work is idleness for those not governing. Protection is not given when intrusted to those whose interest it is to withhold it.

Under Roman law, guardianship of a minor was given to the next heir, in the belief that he best would care for the estate, but, said Sir William Blackstone, "they seem to have forgotten how much it is to the guardian's interest to remove the incumbrance of his pupil's life from that estate for which he is supposed to have so great a regard. And this affords Fortescue and Sir Edward Coke an ample opportunity for triumph; they affirming that to commit the custody of an infant to him that is next in succession is '*quasi agnum committere lupo, ad devorandum.*'"

E. Parmalee Prentice.

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[1] 6 Wall. 35.

[2] Speech on the Oregon Bill, delivered in Senate, June 27, 1884.